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No. 88-1315 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

KATHLEEN JOHNSON WU,
Petitioner,
v.
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENTS BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JOAB THOMAS, AND DOUGLAS JONES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS BELOW

Plaintiff	*Defendants*
Kathleen Johnson Wu	Board of Trustees of the University of Alabama, a body corporate
	Joab Thomas
	Douglas Jones

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Wu v. Thomas*, 847 F.2d 1480 (CA11 1988).

JURISDICTION

The respondents agree that this Court has jurisdiction to consider the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the fourteenth amendment to the Constitution of the United States; and the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and 42 U.S.C. 1983. They are set forth at pages one and two of the appendix filed with the brief of petitioner.

STATEMENT OF THE CASE

The judgment of the district court and its affirmance by the court of appeals are supported by comprehensive findings of fact contained in the district court's Memorandum Opinion.

The petition for certiorari challenges only the legal conclusions of the courts below. There is no contention in the petition that any finding of fact was in error. However, the petitioner's "Statement of the Case" to this Court is grossly inadequate in its presentation of the facts upon which the courts below based their legal conclusions. The respondents respectfully suggest that the following facts may be taken as finally determined:

1. Kathleen Wu was not qualified to be promoted to full professor. (A-9; A-57)[1]
2. No equally or less qualified male was promoted to full professor during the relevant time frame. (A-9; A-57)
3. The standards of academic performance required for promotion to full professor were applied equally to men and women applicants. (A-38-49, 57)
4. During each of the three years that Dr. Wu applied for full professor, women applicants for academic promotion in the College of Arts and

[1] Citations to the decisions of the court of appeals and the district court are to the appendix filed with the petition.

Sciences enjoyed a much higher rate of success than did men. (A-37)

5. The enhanced importance of research scholarship and academic productivity in faculty promotion decisions was well-known to and embraced by the faculty community, and is consistent with similar national trends. (A-28)

The district court went well beyond all requirements of Rule 52 of the Federal Rules of Civil Procedure for specifying the factual bases of its decision. Dr. Wu's attempts to compare her qualifications with other faculty at The University of Alabama were carefully examined by the court. The district court's findings of fact on the qualifications of Dr. Wu and each comparator, the manifest inadequacy of Dr. Wu's academic productivity, the motives of each participant in the promotion process, and all other significant issues raised at trial are articulated in detail in the Memorandum Opinion. Each finding of fact was affirmed by the court of appeals. The petition to this Court does not contend that the district court's findings of fact were erroneous.

REASONS FOR DENYING THE WRIT

Dr. Kathleen Wu seeks the review by this Court of two aspects of the case below. She contends that neither the district court nor the court of appeals adequately addressed her claim under the adverse impact theory of employment discrimination. She further contends that both courts below erred in holding that a prospective promotion in academic rank was not an interest protected by the fourteenth amendment. For the following reasons this Court should deny the writ.

I. Adverse Impact Claim

Dr. Wu contends that the courts below erred in not considering her adverse impact theory of employment discrimination. The record is clear that she neither pled

nor proved an adverse impact claim. Her proof was directed to a claim of intentional sex discrimination in the denial of her promotion to full professor. The district court found, and the court of appeals affirmed, that Dr. Wu did not make a *prima facie* case under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) formula of proof. She was not qualified for a promotion to full professor and no equally or less qualified male was promoted to full professor during the relevant time frame. Having failed to make a *prima facie* case, Dr. Wu's claim would ordinarily be at an end. The district court elected to continue its analysis, however, as if a *prima facie* case had been established.

The district court examined at length and in detail the faculty promotion system at The University of Alabama as it applied to Dr. Wu and to numerous other faculty, male and female. It found that the reasons given for the denial of Dr. Wu's promotion were legitimate, nondiscriminatory, and true. The court found that the standards applied to Dr. Wu were the same standards applied to every other applicant for promotion to full professor in the College of Arts and Sciences during the period of time of Dr. Wu's three applications. During the period of Dr. Wu's failed promotion attempts, every other woman applicant for promotion within the College of Arts and Sciences was promoted. One woman's application was deferred for one year, but she was promoted in her second application. By contrast, the applications of many male faculty members were denied. The academic achievements of those men who were promoted in the College of Arts and Sciences were subject to individual and detailed review by the district court. In each case the court found that the successful promotees were manifestly more qualified than Dr. Wu.

Having lost on her disparate treatment claim, Dr. Wu now contends, as an appellate afterthought, that she also was making an adverse impact claim. The University

does not argue, and the courts below did not find, that a Title VII plaintiff is limited either to the disparate treatment or to the disparate impact theory of recovery. The law is clear that a claim can be made under either one or both theories. In this case only a disparate treatment claim was presented. If Dr. Wu had in fact sought recovery under a disparate impact theory, however, the results would have been the same.

As this Court recently held in *Watson v. Fort Worth Bank and Trust*, —— U.S. ——, 108 S.Ct. 2777 (1988), a plaintiff proceeding under the adverse impact theory must meet two initial burdens:

> The plaintiff must begin by identifying the specific employment practice that is challenged.
>
> . . . .
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.

Watson at 2788, 2789

If a plaintiff successfully meets these two requirements, the employer must show that the challenged policy meets the "business necessity" or "job relatedness", test. When faced with such a showing of job relatedness, the burden remains on the plaintiff to show a substitute policy or practice which would not have a discriminatory impact and which would accomplish the same legitimate goals of the employer. Dr. Wu's case utterly fails to meet any of the adverse impact requirements.

A. What Is the Challenged Policy?

Dr. Wu contends that the University's enhanced emphasis on research scholarship has an adverse impact on women faculty. Without the slightest basis in the rec-

ord or in the reality of higher education, Dr. Wu likens judgments on academic scholarship to the high school diploma requirements addressed in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In her petition she contends:

> An unjustified requirement of more publications for promotion is unlawful where the requirement keeps women in lower academic ranks.
>
> Increased publication of scholarly articles by faculty may be a facially neutral requirement but raising publication requirements, especially for the top rank into which few women had risen, is a barrier invidiously operating to discriminate on the basis of sex.
>
> (Petition, page 10)

The experience of women faculty at The University of Alabama gives the lie to such a bizarre notion. The dormancy of Dr. Wu's research scholarship, carefully and accurately described by the district court at A-31 through A-32, was neither the product nor a symptom of a gender-based trait.

Even if academic quality requirements had an adverse impact on women applicants, those requirements would be permitted if they were adequately job related. Every court considering this issue has held that requirements for academic scholarship are quintessentially "job related". In *Watson v. Fort Worth Bank and Trust* this Court once again confirmed this principle and cited with approval *Zahorik v. Cornell University*, 729 F.2d 85 (CA2 1984) which held:

> [The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related. . . . It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review. *Zahorik* at 96.

Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, at 2791.

Relying upon *Bishop v. Wood*, 426 U.S. 341 (1976) the fourth circuit held that:

> Denial of a faculty promotion based on an evaluation of the faculty member's "scholarly achievements" is exactly the type of determination which, under *Wood*, is not justiciable in federal court in an action under § 1983. And that has long been the ruling uniformly applied by the courts, and now affirmed in *Wood*, for which there is an abundance of supporting reasons.

Clark v. Whiting, 607 F.2d 634, at 639 (CA4 1979). The decisions of the district court and the court of appeals are perfectly consistent with this uniformly recognized principle of law and fact of academic life.

Even if she challenged an employment policy which did not pass the "job relatedness" test, Dr. Wu would have been required to show a causal relationship between that policy and the composition of the work force. Dr. Wu's attempt at meeting the causality test represents a classic misunderstanding of the law of adverse impact. She introduced no "applicant flow" data, no evidence of any disparity in the application success of men and women, no evidence of the "available labor pool" of minimally qualified applicants for promotion to different academic ranks in the various academic disciplines, and no evidence that the heightened scrutiny of scholarly output in any way adversely affected women applicants. The University's uncontradicted applicant flow evidence proves that women applicants have been successful at a far greater rate than their male counterparts under the enhanced standards.

In a last effort to articulate an adverse impact cause of action, Dr. Wu misreads this Court's recent holding in *Watson*. The University never contended, and neither

the district court nor the court of appeals ever ruled, that the statistical results of employment decisions based upon subjective factors could not support an adverse impact determination if properly pled and proved. The principle articulated in *Watson* has been the rule in the eleventh circuit for some time. *See, Griffin v. Carlin,* 755 F.2d 1516, 1522-1525 (CA11 1985).

II. Is a Prospective Promotion in Academic Rank an Interest Protected by the Fourteenth Amendment?

Dr. Wu also contends that the courts below erred by holding that a prospective promotion in academic rank is not an interest protected by the fourteenth amendment. Dr. Wu attempted to assert a fourteenth amendment claim under 42 U.S.C. 1983. As a matter of law, the rulings below are governed by and consistent with this Court's decision in *The Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). This result is in accord with similar decisions in other circuits. *See, Clark v. Whiting,* 607 F.2d 634 (CA4 1979); *Bigby v. City of Chicago,* 766 F.2d 1053 (CA7 1985), *cert. denied,* 106 S.Ct. 793 (1986); *Webster v. Redmond,* 599 F.2d 793 (CA7 1979), *cert. denied,* 444 U.S. 1039 (1980). In Dr. Wu's case, the denial of her promotion applications in no way impaired her job security as a tenured faculty member, stigmatized her, or deprived her of any right to which she had a vested claim or entitlement.

Even if a promotion in academic rank were a protected interest under the fourteenth amendment, the facts as established by the district court would be an absolute bar to Dr. Wu's recovery under 42 U.S.C. 1983. The district court meticulously examined the motives of University officials involved in these promotion decisions. The district court found that there was no impermissible motive. Hence recovery under 42 U.S.C. 1983, which requires a finding of invidious intent, would be improper.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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